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Supreme Court of the United States

October Term, 1977

No. 77-1567

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of

JOHN PATRICK FAY, also known as JOHN P. FAY,

Deceased,

VIOLET JOSEPHINE FAY BUCK,

Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,

Appellees,

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

WHITE & CASE
Attorneys for Appellees
14 Wall Street
New York, N. Y. 10005

JAMES G. MCGOLDRICK
Attorney for Appellant
20 Broad Street
New York, N. Y. 10005
(212) 422-6767

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Two World Trade Center
New York, N. Y. 10007

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Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,
Appellees,

STATE OF NEW YORK,
Appellee.

JURISDICTIONAL STATEMENT

Appeal from the Court of Appeals of the State of New York.

Pursuant to the Supreme Court Rules 13, par. 2, and 15, pars. 1 & 2, the appellant above named files this, her Jurisdictional Statement, on which she contends the Supreme Court of the United States has appellate jurisdiction to review on appeal the final judgment appealed from herein.

OPINIONS OF THE STATE COURTS

The opinion of the New York Court of Appeals, set forth in Appendix A, is reported in 44 N.Y.2d —, — N.E.2d —, — New York Supp. 2d —; the opinion of the Appellate Division of the New York Supreme Court, First Department, is reported in 55 A.D.2d 541 (12), 389 New York Supp. 2d 793; and the opinion of the Surrogate Judge of the Surrogate's Court, New York County, is unreported.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

1. The appeal herein is from a final judgment of the Court of Appeals of the State of New York, wherein and whereby appellant's objections and claim of entitlement to an inheritance in intestacy in an intermediate accounting proceeding instituted by the Public Administrator of New York County in the Surrogate's Court of New York County were dismissed.

2. The final judgment sought to be reviewed was made and entered on the 29th day of March, 1978. The notice of appeal was served on the attorneys for all the appellees and filed in the Surrogate's Court, New York County, on the 25th day of April, 1978. A copy of the final judgment is in Appendix B. A copy of the notice of appeal is in Appendix C.

3. The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of the appeal is section 1257 (2) of Title 28 of the *United States Code*.

4. Cases believed to sustain jurisdiction are: *Trimble* v. *Gordon*, 430 U.S. 762, *Lalli* v. *Lalli*, 431 U.S. 911, *Pendleton* v. *Pendleton*, 431 U.S. 911, *Schanefelt* v. *Paradiso*, 431 U.S. 911, *Reed* v. *Reed*, 404 U.S. 71.

5. The statute of the State of New York, the validity of which is involved by appellant's challenge of unconstitutionality, is *Estates, Powers* and *Trusts Law*, hereinafter referred to as EPTL, § 4-1.2(b), which provides:

> If an illegitimate child dies, his surviving spouse, issue, mother, *maternal kindred* and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2). (Emphasis supplied.)

MATERIAL STATUTES INVOLVED

EPTL 4-1.2 (17B, McKinney's Consolidated Laws of New York, pp. 531-532), effective Sept. 1, 1967, reads in pertinent part:

> § 4-1.2 *Inheritance by or from illegitimate persons*
>
> (a) For the purposes of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> . . . . .
>
> (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of

administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

EPTL 4-1.1 (17B McKinney's Consolidated Laws of New York, pp. 476-477), effective Sept. 1, 1967, as last amended L. 1974, c. 903, reads in pertinent part:

§ 4-1.1 *Descent and distribution of a decedent's estate*

The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:

(a) If a decedent is survived by:

. . . . . .

(7) Brothers or sisters or their issue, and no spouse, issue or parent, the whole to the brothers or sisters or to their issue per stirpes.

. . . . . .

(d) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

. . . . . .

Excerpt from "An Act for the Better Registration of Births, Deaths and Marriages in Scotland [7th August 1854]" (17° & 18° Vict. c. 80), printed in London by George Edward Eyre and William Spottiswoode, Printers to the Queen's Most Excellent Majesty (1854):

XXXV. In the Case of an illegitimate Child it shall not be lawful for the Registrar to enter the Name of any Person as the Father of such Child, unless at the joint Request of the Mother and of the Person acknowledging himself to be the

Father of such Child, and who shall in such Case sign the Register as Informant along with the Mother: . . .

(From record before New York Court of Appeals, Supplementary Appendix on Appeal, pp. 585-586).

MATERIAL SCOTTISH REGULATION INVOLVED

Excerpt from the "Regulations for The Duties of Registrars of Births, Deaths and Marriages, and of Assistant-Registrars, made and approved in pursuance of the Act for the Better Registration of Births, Deaths, and Marriages in Scotland (17° & 18° Vict. c. 80), July 1869, printed by Murray and Gibb, Edinburgh, for the Registrar of Births, Deaths and Marriages:

Illegitimate Children.

In the case of an *illegitimate* child, the Registrar must not enter the name of any person as the father, unless at the joint *personal* request of the mother and of the person acknowledging himself to be the father, who, under these circumstances, shall sign the Register, as informant, along with the mother, and shall be registered as the father, the word ILLEGITIMATE being added to the child's name. . . . (Italicization and capitalization in original; p. 14).

(From the record before New York Court of Appeals, Supplementary Appendix on Appeal, p. 14).

CONSTITUTIONAL PROVISION INVOKED BY APPELLANT

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Constitution, Amend. XIV, sec. 1)

QUESTIONS PRESENTED BY THE APPEAL

1. Does EPTL 4-1.2(b) as written, interpreted by the New York State Court of Appeals and as applied to appellant, requiring a judicial order of filiation during the lifetime of appellant's father as the exclusive precondition for inheritance from her half-brother, a formally acknowledged illegitimate, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

2. Does EPTL 4-1.2(b), as written, interpreted by the New York State Court of Appeals and as applied to appellant, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by denying to her, as a half-sister of the acknowledged illegitimate decedent, solely because she is of the *paternal* kindred, the right to inherit from him; notwithstanding, for the purposes of inheritance in intestacy, she is similarly circumstanced in EPTL 4-1.1(a)(7)([d]) with *maternal* kindred who take absolutely in EPTL 4-1.2(b)?

PREFACE TO STATEMENT OF THE CASE

Here there is no dispute over the fact of parentage. The paternity of decedent John (Herbert or Patrick) Fay never was in doubt and is not an issue on this appeal. His father publicly acknowledged decedent as his child in his baptismal and birth certificates. Decedent's maternal nieces, the appellees, concede, and the Surrogate confirmed, his paternity. As a fact, his maternal relatives could not deny decedent's paternity since the underpinnings to the establishment of their relationship to him rest on his birth and baptismal records and, significantly, during the entire life of the decedent, appellees were wholly unaware of their relationship to him.

STATEMENT OF THE CASE

The decedent, known throughout his life by his father's name, John Fay, was born on April 20, 1892, in Edinburgh, Scotland. His baptismal certificate (Appendices D and E, pp. D-1, E-1) shows decedent was baptized as John Herbert Fay, son of John and Eliza Fay, formerly Hunter, lawfully married, on May 1, 1892, in Edinburgh, Scotland. Decedent's civil registration of birth, registered on August 11, 1892 in Edinburgh, Scotland, states he is John Herbert Fay, child of John Fay and Eliza Hunter. Both his parents signed their names on his civil birth record, stating thereon they were the father and mother of decedent, which record was witnessed in writing by the Scots civil registrar. The word "illegitimate" was written on the birth record (Appendix F, p. F-1).

Decedent died intestate on August 9, 1970, a domiciliary of New York and a citizen of the United States. His parents predeceased him. His father died, intestate and penniless, on August 11, 1915, in England; there were no estate proceedings. His mother died on August 24, 1932, in Northern Ireland, leaving a Will by which she bequeathed her estate, personal property, to one of her four sons and some grandchildren.

The genesis of this appeal is a proceeding instituted in the Surrogate's Court, New York County, by the Public Administrator of that county for the settlement of his account as administrator of John Fay's intestate estate. So far as here relevant, the Public Administrator's allegation that decedent Fay's intestate distributees were unknown was controverted by Violet Buck, appellant here, who alleged and established that she was a *paternal* half-sister and a distributee of decedent and argued to the Surrogate that her half-brother was the legitimate son of his father, John Fay, the parent they had in common; that if the Surrogate determined Fay were not legitimate,

nevertheless the statute EPTL 4-1.2(b) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

At the hearing before the Surrogate, Douglas Baird, the then principal in charge of the registration of births, deaths and marriages in Edinburgh, Scotland, testified that the registrar could enter the name of the father of an alleged illegitimate child only if the father attended along with the mother, and was further asked and answered:

Q. Was the father required to do anything at that time [of registration of decedent's birth]?

A. He was required to acknowledge paternity by signing the register as joint informant.

Appellant produced evidence as to the abiding interest, concern and support of both parents with respect to decedent's upbringing, education and maintenance at least until their son went to sea as an apprentice seaman, and also produced evidence as to decedent's own pedigree statements on his application for U. S. naturalization, his passport applications and his hospitalization admission records in which he invariably referred to his parents as Eliza and John Fay.

The Surrogate found that decedent left a paternal half-sister (appellant) and three maternal nieces (appellees) as his intestate relatives; that the decedent was illegitimate; that EPTL 4-1.2 was constitutional; and that the appellees took the entire estate to the exclusion of the appellant because there was no order of filiation.

Appellant also argued the issue of legitimacy and the constitutional issues to the intermediate appellate court, the Appellate Division, which affirmed the Surrogate's decree for the reasons stated by him in his opinion (55

A.D.2d 541[12]). Appellant argued the legitimacy and constitutional issues to the State Court of Appeals. The highest State Court held that it could not review the legitimacy issue and that EPTL 4-1.2(b) was constitutional (Appendix A; 44 N.Y.2d --).

REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

(a) Preliminary Argument

Had the authority of *Trimble* been accepted by the State Court of Appeals in this case and *Lalli II* (*Matter of Lalli*, 43 N.Y. 2d 65), the principal thrust here would have been placed on the unequal application of so much of the statute, as written and applied to appellant, which excludes her, solely because her entitlement is derived through the decedent's father, from a substantial inheritance which otherwise would be transmitted to her by her acknowledged illegitimate half-brother, in intestacy.

The State court's indisposition to accept acknowledged paternity as an alternative and paternal kindred as well thus becomes an obverse and converse disengagement by the court from constitutionally-defined considerations of equal protection formulated by this Court. Obversely, were the statute to be stricken for a failure to provide *Trimble's* required alternative, appellant still would not take because she is paternal kindred. Conversely, were the statute to be stricken for unconstitutional, gender-based discrimination, appellant still would not inherit because the State Court of Appeals commands the statute to say an order of filiation is the sole means of entry into the single door of inheritance, by intestacy, from an illegitimate.

Therefore, since the State Court of Appeals, in threads of gossamer distinguishment, refused to follow the pattern, weave and fabric of *Trimble's* ultimate authority

requiring statutory acceptance of a formal acknowledgment by a father as an alternative, this appeal is founded on the dual premise that the section, as construed and applied to appellant, rests on unequal, inequitable, intolerant and unduly harsh standards for inheritance in intestacy in compound violations of the Equal Protection Clause of the Fourteenth Amendment by (1) discriminate refusal to accept appellant's substantive alternative, and (2) gender-based discrimination in refusing to accommodate paternal kindred: accordingly, it should be struck down in its entirety.

The constitutional infirmities of EPTL 4-1.2(b) are: (1) the judicially-imposed condition that an illegitimate's paternity must be established exclusively by a judicial order of filiation determining paternity, where the Legislature is silent as to the form and manner of paternity proof; and (2) the unequal application of the statute which excludes inheritance by appellant from her intestate illegitimate half-brother because appellant's entitlement is from and through decedent's father, even if there were an order of filiation, and despite such absolute entitlement by the niece appellees' claiming from and through decedent's mother, without such order. In such circumstances, in our view, the statute's inability to cope with constitutional infirmities is not cured by a State court opinion which doctors the statute with a remedy of hopeless emancipation for appellant from the stigma of illegitimacy which has been attached to her right of inheritance.

In *Lalli II*, the State Court of Appeals, on remand, definitively interpreted EPTL 4-1.2(a)(2) to require an order of filiation determining paternity in precise compliance with the statutory language as the indispensable condition to an illegitimate's reception of the father's intestate property.

In this case, the State Court of Appeals struck the penultimate blow to the constitutionality of EPTL 4-1.2

by authoritatively determining that it may, "beyond reproach," in the absence of statutory language, judicially legislate into EPTL 4-1.2(b) the requirement of an order of filiation as a precondition to the establishment of paternity, thereby making an order of filiation the sole and exclusive means by which paternal kindred may inherit from an intestate illegitimate. Though the State court twice recognized in *Lalli II* (43 N.Y. 2d at p. 69) that a formal acknowledgment was an acceptable "prerequisite" or "requirement" to this Court, the State court nevertheless held, a formal acknowledgment of paternity was *not* an acceptable "alternative" to a judicial order of filiation. This Court thereafter noted probable jurisdiction of the *Lalli II* judgment (*Lalli* v. *Lalli*, No. 77-1115, March 21, 1978, 46 U.S.L.W. 3578).

The congenital constitutional defect in EPTL 4-1.2(b) is the failure of the Legislature to consummate the right of paternal kindred to inherit from an illegitimate and the right of an illegitimate to inherit from paternal kindred. In no circumstances may paternal kindred inherit from an intestate illegitimate or he from them: the property escheats to the State. Reciprocal rights of intestate succession between illegitimates and maternal kindred and between legitimate and maternal kindred are explicitly granted by the statute. The mote in the Illinois statute may not detract from the beam in the New York statute: "the discrimination remains apparent" (*Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172).

EPTL 4-1.2(b) provides that *only* a filiation order from a competent court suffices to permit reciprocal intestate inheritance between an illegitimate child and his father; and denies paternal kindred, in any circumstances, the right to inherit from an illegitimate intestate.

Since such right is granted to maternal kindred, our position is, this statute invidiously discriminates between the male and female blood lines, where, as here, the

maternal and paternal kindred are similarly circumstanced in the New York statute of descent and distribution (EPTL 4-1.1(a)(7)[d]).

(b) The Establishment of Paternity

There is no single salutary indispensable statutory requirement as to the form and manner of proving an illegitimate's paternity for inheritance purposes that should satisfy a State's proper objective "in providing for the orderly settlement of estates" (Appendix A, p. A-7).

The Minnesota experience is particularly illuminating. Minnesota enacted its legislation treating with intestate distribution of an estate "to provide for the orderly distribution of property left by an intestate decedent." (*Matter of Pakarinen*, 287 Minn. 330, 336, 178 N.W.2d 714, 717, app. dsmd. 402 U.S. 903). To the *Lalli II* court, it was clear, "even in the absence of specific legislative materials, that this statute [EPTL 4-1.2] serves a legitimate State purpose—in the language of *Trimble*, to make provision for 'the orderly settlement of estates . . .'" (43 N.Y.2d at pp. 69-70).

In *Pakarinen*, the Minnesota Supreme Court decided, in 1970, that the statutory requirement (Minn. St. 525.172)) of an attested written declaration of paternity made by the father as the exclusive means by which an illegitimate child could inherit from its father was constitutional; that an adjudication of paternity made by a Minnesota court was not the equivalent of the required statutory proof. The Minnesota court contrasted the two forms of paternity proof in this language (287 Minn. at pp. 337-338):

> And while a written attested declaration of paternity does not provide absolute proof, it does offer the most persuasive proof available (short of marriage to the mother) of the pivotal element:

> an unequivocal acknowledgment of paternal affection and concern for the illegitimate child. Unlike a plea of guilty, which may be made to avoid the expense and embarrassment of trial in a paternity suit, a voluntary written statement which manifests the man's desire to accept this child as his own is such an acknowledgment and, from the public view, establishes both a biological and legal relationship to him.

The Minnesota Legislature thereafter amended Minn. St. 525.172 in 1971 (L. 1971, c. 122) to provide an additional and alternate means for an illegitimate to inherit: "An illegitimate child shall inherit from . . . the person who in writing . . . shall have declared himself to be his father . . . *or* from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction. . . ." This acceptance of an alternative means in no way compromised the State's legitimate interest in the accurate and efficient disposition of an intestate's property.

The exclusivity of a court filiation order as evidence of paternity so as to permit reciprocal intestate inheritance between an illegitimate child and its father has been rejected by this Court as a matter of Federal constitutional law (*Trimble* v. *Gordon*, 430 U.S. 762; *Lalli* v. *Lalli*, 431 U.S. 911).

Observing that "there is a point beyond which such deference [to a state's substantial interest in the orderly settlement of estates] cannot justify discrimination." (*Trimble* v. *Gordon*, *supra*, at p. 767, n. 12), this Court authoritatively was of the view that a "formal acknowledgment of paternity" to establish an illegitimate child's right to claim his share of his father's intestate estate would not compromise a State's interests (*Trimble* v. *Gordon*, *supra*, at p. 772, n. 14).

Although there was a filiation order in *Trimble*, this Court (at pp. 765, 773) took note that the Illinois Su-

preme Court orally affirmed *Trimble* on the authority of *In re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234, involving the consolidated appeals of *Karas* and *In re Estate of Woods*, where there was not, in either case, a filiation order (*Karas*, at 43-44).

Moreover, there is no present member of this Court who is not of the view that a formal acknowledgment of paternity should suffice to establish an illegitimate child's paternity. All the dissenting Justices in *Trimble* agreed in *Matthews* v. *Lucas*, 427 U.S. 495, at 513-514, with the assessment of the three-judge court as it originally ruled in *Norton* v. *Weinberger*, 364 F. Supp. 1117, 1128:

> . . . Conceding that a written acknowledgment lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child, unless the child is theirs, and a man who has acknowledged a child is more likely to provide it support than one who has not.

The similarity of the positions taken by the State Court of Appeals in *Lalli I* (*Matter of Lalli*, 38 N.Y. 2d 77), *Lalli II*, and in this case, leaves no doubt the State court is insensitive to the acceptance of a constitutional substantive alternative. This limited surface position of acceptance of, but away from the principle of *Trimble*, taken by the State's highest court in these three recent decisions has crystalized its original position in *Lalli I* into a firm opposition to *Trimble's* broader constitutional reach for an acceptable alternative, bringing the State court, not alone in direct conflict with *Trimble*, but also with *Oregon* v. *Hass*, 420 U.S. 415, 419, wherein this Court said: "But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional*

law when this Court specifically refrains from imposing them." (Italics in original; see, also, *In re Karas*, 61 Ill. 2d 40 at 53)

The disquieting factor in this case is that the State, not through its Legislature but by the fiat of its highest court, has ordained that there shall be but one means of establishing an illegitimate's paternity where inheritance by paternal kindred is involved. This imposition has been mandated despite the lack of any legislative requirement as to paternity proof in EPTL 4-1.2(b) in such instances. And this imposition pointedly was made even after the State Court of Appeals recognized that this Court held (*Trimble*, at p. 772, n. 14) a formal acknowledgment of paternity acceptable (*Lalli II*, 43 N.Y.2d 65, 66). Moreover, out-of-state statutory provisions for the acknowledgment of an illegitimate's paternity which do not meet the precise requirement of the New York filiation order determining paternity will not be recognized in New York. Due Process constraints limit the extent to which a State may monopolize the process of establishing status (*Zablocki* v. *Redhail*, — U.S. —, 54 L.Ed.2d 618, 637, 639-640 [Powell, J., concurring]).

The opinions of the Court of Appeals in *Lalli* and in this case, resting as they do on generalizations of feasibility and archaic notions of precision to be found solely in orders of filiation, are sand-based foundations in ritual adherence to form in distinguishment of, rather than to the substance of, *Trimble*.

In sum, a State may not constitutionally treat a publicly acknowledged illegitimate child differently from an illegitimate child for whom a filiation order has been obtained, and *neither* may such child be treated less equally than a legitimate child for all purposes of inheritance in intestacy. *Trimble* v. *Gordon*, *supra*, mandates that such illegitimates be treated as legitimates

under the Equal Protection Clause of the Fourteenth Amendment.

(c) Unconstitutional Unequal Application of EPTL 4-1.2(b)

The Surrogate found that decedent left a paternal half-sister (appellant) and three maternal nieces (appellees) as his intestate relatives; and although they are similarly circumstanced in the New York statute of intestate descent and distribution (EPTL 4-1.1(a)(7)[d]), he held that the maternal nieces took the entire estate to the exclusion of the paternal half-sister since the decedent was illegitimate (EPTL 4-1.2[b]). If the decedent had been found legitimate, his estate would have been distributed one-third to appellant, his half-sister; one-third to appellee Caillol, his niece, child of a predeceased half-brother; and one-third shared equally between appellees Spencer and Wetherall, his nieces, children of another predeceased half-brother (EPTL 4-1.1(a)(7)[d]).

EPTL 4-1.2(b) limits the distributees of an illegitimate child to the following classes: (1) surviving spouse, (2) issue, (3) mother, (4) maternal kindred, (5) father (if there has been a filiation order). The distinction between the coverage in the fourth class, i.e., maternal kindred, and the fifth class, i.e., father (with a filiation order), is the same distinction which was made by the *Lalli II* majority between the Illinois statute and the New York statute. *The definition of the class "maternal kindred" obviously excludes the class of paternal kindred absolutely, regardless of filiation order or other proof of paternity.* The illegitimate's father, on the other hand, is allowed to take if there is a filiation order. What is this but, in the words of the *Lalli II* court speaking of the Illinois statute, "a manifested and impermissible hostility to illegitimacy as such, unrelieved even if there

were no doubt whatsoever as to paternity" (*Matter of Lalli*, 43 N.Y.2d 65, 68)?

Under EPTL 4-1.2(b) maternal kindred need prove that they are nearest in consanguinity so as to permit them to inherit from an intestate illegitimate child, and no more.

Irrationally, from a constitutional overview, even though nearer in consanguinity to the intestate illegitimate than the maternal kindred and even where there has been a filiation order or formal acknowledgment during the father's lifetime, paternal kindred are denied the right to inherit from him. A maternal first cousin takes the intestate illegitimate's estate to the exclusion of a paternal uncle. (Under EPTL 4-1.2(a), the illegitimate never takes from his paternal kindred).

In *Reed* v. *Reed*, 404 U.S. 71, 75-76, this Court unanimously found that the Equal Protection Clause of the Fourteenth Amendment does "deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute and held that a "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)."

The categorical exclusion of all paternal kindred inheriting from an illegitimate child, even where there has been a filiation order or a formal acknowledgment by the father of his child, is constitutionally impermissible (*Trimble, supra; Jiminez* v. *Weinberger*, 417 U.S. 628, 636, 637; *Gomez* v. *Perez*, 409 U.S. 535, 538; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164; *Levy* v. *Louisiana*, 391 U.S. 68).

There is no question that an intestate succession statute may discriminate against collateral relations, as opposed to ascendants, and against ascendants, as opposed to descendants. But, paraphrasing *Gomez* v. *Perez*, *supra*, once a State posits a judicially enforceable right on behalf of maternal kindred to inherit from an intestate illegitimate, there is no constitutionally sufficient reason for denying such a right to his paternal kindred simply because his acknowledged and acknowledging father has not married his mother.

Where there is designed "asymmetrical statutory discrimination against the illegitimate children of intestate men" (*Trimble*, *supra*, at p. 770), it might rationally be demanded that some State interest to be furthered by the exclusion of paternal kindred be declared.

The State court, appreciating that the borrowed "orderly settlement of estates" justification might sound hollow in the context of this case in order to sustain its resistive adherence to *Trimble* in the requirement of a judicial order of filiation as the sole means of establishing an illegitimate's paternity, finally decided to take note that the Legislature enacted EPTL 4-1.2 on the basis of the study and recommendations of the Bennett Commission on Estates, hereinafter referred to as the Commission (*Lalli II*, 43 N.Y.2d 65, 69).

From an analysis of the Commission's recommendations in detail, pp. 265-268 (Appendix G, pp. G-1-5), it is evident that these recommendations, made in April of 1964, bear the constitutional infirmities disclosed in the dozen opinions of this Court, culminating in *Trimble*.

Enacted in accordance with the Commission Report to ameliorate the harshness of the *nullius filius* view of the Common Law, "tempered by a secondary interest in protecting against spurious claims of paternity" made by illegitimates after the deaths of their fathers (*Trimble*, at p. 776; Appendix G, at p. G-2), EPTL 4-1.2 is now,

under Federal constitutional scrutiny, a statute constitutionally flawed.

The State Court of Appeals says that "[i]t was the Commission's *belief* that the maternal kindred of an illegitimate child would often have knowledge of the child's birth . . ." (Appendix A, p. A-7; emphasis added). The Commission's word was "assumed" (Appendix G, p. G-3). And to what purpose? To "make testamentary provision to exclude such child from sharing in their estate if they wish, while the relatives of the father, in most instances, will have no such knowledge or opportunity." (*Ibid.*) This is no justification to exclude illegitimates *from* paternal inheritance in an intestate succession statute (*Trimble*, at pp. 773-774).

To the Commission, a recognized or acknowledged illegitimate is one whose paternity has been judicially determined by a court of competent jurisdiction during the father's lifetime (*Recommendations*, pp. 241, 266-267, reprinted in Appendix G, pp. G-1 thru 5). The Commission's report was geared almost entirely to the view that *recognized* illegitimates should be barred from inheriting from paternal kindred and from prosecuting proceedings to consummate their right to inherit—"To allow such suits would impede unnecessarily the administration of estates; [and] invite blackmailing litigation. . . ." (Appendix G, p. G-3, 2nd full par., last sentence). The administrative convenience objective is an inadequate justification for gender-based classifications (*Reed* v. *Reed*, 404 U.S. 71, 76; *Craig* v. *Boren*, 429 U.S. 190, 198; *Califano* v. *Goldfarb*, 430 U.S. 199, 211, n.9). Most emphatically, neither decedent nor appellant come within any of the Report objectives of the Commission pertaining to illegitimates.

The State Court of Appeals advanced a further justification for the discriminatory treatment of paternal kindred: "By excluding paternal kindred, other than the father, the Commission sought to avoid creation 'by law

[of] a family group that did not exist in reality'" (Appendix A, p. A-7; Appendix G, p. G-3, 2nd full par., last sentence). At the referenced point, the Commission was treating only inheritances *by* recognized illegitimates *from* paternal kindred. In the fourth paragraph on that page of its recommendations, the Commission demonstrates its even-handed discrimination by saying, without more, "However, no kindred of the father may represent him to take from the estate of the *recognized* illegitimate." (G-4, 1st par.; emphasis added) This is the sum and substance of why paternal kindred may not inherit *from* an illegitimate. We find it difficult to perceive how several unrecognized, unacknowledged illegitimates of a mother, each by a different father, creates a family group entitling them, for that reason, to inherit from maternal kindred or the material kindred to inherit from them.

But the surpassingly extraordinary fact is that these justifications are advanced to support a constitutionally indefensible objective: the exclusion of reciprocal inheritance rights between paternal kindred and a *legally acknowledged* illegitimate, despite such rights being granted maternal kindred and unacknowledged illegitimates and despite the reciprocal inheritance rights between legitimates and maternal and paternal kindred.

Nevertheless, the State Court of Appeals says that "this exclusion [of paternal kindred] is not directed *at* the illegitimate. It is not a punishment for the conduct of his or her parents. Nor are individuals related to the illegitimate denied inheritance on the basis of *their* sex. It is merely a legislative judgment to ensure that only the *true members* of an *illegitimate's family* are permitted to share in his or her estate." (Appendix A, p. A-7; emphasis added)

The Court stresses that we are concerned here not directly with the rights of the illegitimate but with the rights of his paternal kindred. But what difference does

this make? In our view, an illegitimate whose paternity has been acknowledged in a statutorily-prescribed manner, as here, should be treated in every way and in every circumstance as a legitimate. The right to have the same collateral distributees as a legitimate may seem at first blush to be a rather special right, but such an illegitimate should have *every* right, special or not, that the legitimate has. Decedent's paternity is not in doubt, and his kindred, both paternal and maternal, have been established beyond question. There is no social or legislative reason why distribution should not be made to his distributees in the same way that it would have been had he been deemed to have been born legitimate. He and his estate should be vested with all the rights of a legitimate and a legitimate's estate. The right to transmit an intestate inheritance is no less a right than the right to receive an intestate inheritance. Equal protection of the laws is not a sometime right that State courts may cast aside to sustain merely a legislative judgment. "It is a command which the State must respect, the benefits of which *every person* may demand." (Stone, J., in *Hill* v. *Texas*, 316 U.S. 400, 406; emphasis added)

The supports for this family unit "incantation" (*Trimble*, at p. 769) are insubstantial. The assertion that the exclusion of paternal kindred is not a punishment for the conduct of the illegitimate's parents is its own refutation. It is the illegitimate who is once again penalized: unlike the legitimate, the illegitimate may not transmit his intestate inheritance to paternal kindred nor they to him, in part because of his status. Surely no acknowledged illegitimate would be heard to say he or she is not punished by an arbitrary denial of a substantial inheritance from paternal kindred in intestacy.

Moreover, it is irrelevant to say that individuals related to the decedent are not denied inheritance on the basis of *their* sex: the members making up the paternal kindred of an intestate illegitimate may all be females or

all males or females and males. What is relevant and unjustified is that the *paternal* line is an excluded group solely on a gender-based discrimination—the sex of the illegitimate's parents. Maternal kindred may take; paternal may not. It is difficult to see why this distinction is based on anything but sex. In the case at bar, there is not the slightest question in anyone's mind that appellant is related to decedent's father and appellees to his mother. If one class is rejected and the other is accepted, it can only be because of the difference of a father and mother, and what is that but a difference in sex? The discrimination, therefore, is, in our view, invalid (*Reed* v. *Reed*, 404 U.S. 71, 77; *Schanefelt* v. *Paradiso*, 431 U.S. 911; and see, *Green* v. *Woodard*, 40 Ohio App.2d 101, 318 N.E.2d 397 [1974]).

The State Court's assertion that "[i]t is merely a legislative judgment to ensure that only the true members of an illegitimate's family are permitted to share in his or her estate" (Appendix A, p. A-7) is factually insufficient for analytical purposes. Is this the incantation of a legitimate state purpose? Does the exclusion of paternal kindred encourage marriage, discourage promiscuity or protect the family? What is a "true" member of an illegitimate's family? Is this a moral judgment, a standard of conduct, perhaps, or a biological fact, or a mere legislative judgment that a "true" member of an illegitimate's family is a legitimate member, or is it merely the age-old discrimination against illegitimates perfumed and tailored to fit archaic notions of illegitimacy in euphemistic allusions to family propriety to be found solely in maternal kindred? Would the decedent have accepted the appellees, who never knew he existed, as the true members of his family? Whatever the answer is, the incantation has "only the most attenuated relationship to the asserted goal" (*Trimble*, at pp. 768-769 and n. 13) and "bears no fair and substantial relation" to a proper State purpose (*Reed* v. *Reed*, 404 U.S. 71, 76, quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412,

415). Why then are decedent's maternal nieces, "true" members and appellant, his paternal half-sister, an *untrue* member of his family? In fact, we know of no rational answer to this divisive distinction, and, we believe, there is none. Notwithstanding, the State court held the discrimination between maternal and paternal kindred constitutionally permissible (Appendix A, p. A-7).

The arbitrary classification in the case at bar, premised on the decedent's illegitimacy and the sex-based variant for the purposes of inheritance in the parents, creates two categories of collaterals who, although similarly circumstanced in the intestate succession statute, are nonetheless treated differently. This "double-barreled" discrimination in a matter of intestate succession based on two disfavored classifications—illegitimacy and gender—cannot survive constitutional scrutiny and mandate where, as here, they are "illogical and unjust," and bear no fair and substantial relation to a proper State objective (*Trimble* v. *Gordon*, 430 U.S. 762; *Schanefelt* v. *Paradiso*, 431 U.S. 911; *Califano* v. *Goldfarb*, 430 U.S. 199; *Craig* v. *Boren*, 429 U.S. 190; *Gomez* v. *Perez*, 409 U.S. 535; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164; *Reed* v. *Reed*, 404 U.S. 71). The means selected by the State for achieving these improper and insubstantial interests—the total exclusion of paternal kindred—is abhorrent to due process and equal protection concepts: EPTL 4-1.2 cannot be sustained.

Where there has been a filiation order or a formal paternal acknowledgement, as here, we submit that illegitimates should be fully admitted into the community of equal entitlement among human beings, freed at last from the status of "nonpersons" (*Levy* v. *Louisiana*, 391 U.S. 68, 70) in the New York intestate statutes of descent and distribution. When such a person dies, he or she should not be considered, in the divisiveness of an "illegitimate child" (EPTL 4-1.2[b]), but rather, in the wholeness of a "decedent" among all other decedents whose estates are distributed pursuant to EPTL 4-1.1: "The property of

a *decedent* not disposed of by will . . . shall be distributed. . . ." (Emphasis added)

The New York statute governing intestate succession mandates that this domiciliary decedent's estate be distributed to his siblings or to their issue *per stirpes* and that his relatives of the half-blood shall be treated as if they were of the whole blood (EPTL 4-1.1(a)(7)[d]).

Appellant-half-sister and niece-appellees are similarly circumstanced, but are not treated alike: there is no legitimate State interest promoted by differentiating in the circumstances here present between a paternal kin closer in consanguinity and maternal kindred. In this state of affairs, the statute's exclusion of paternal kindred is faulted biologically and flawed constitutionally since a general state of mind governed the assumption of the Commission, transposed into a belief by the State court, instead of a state of facts.

In light of the foregoing, the statute's blanket exclusion of paternal kindred from inheriting from an acknowledged illegitimate where maternal kindred are so permitted is arbitrary and violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

Appellant respectfully submits the Supreme Court of the United States has jurisdiction of this appeal.

Dated: April 27, 1978

Respectfully submitted,

JAMES G. MCGOLDRICK
Attorney for Appellant
Violet Josephine Fay Buck

HAWKINS, DELAFIELD & WOOD
67 Wall Street,
New York, N. Y. 10005
Of Counsel

APPENDICES

APPENDIX A

Opinion of the Court of Appeals, State of New York, dated March 29, 1978, Case No. 103 (formal parts omitted)

Before Breitel, Chief Judge Presiding

JASEN, J.:

In this accounting proceeding by the Public Administrator of the County of New York, objections were filed by several potential claimants. This appeal involves only objections raised by Violet Josephine Fay Buck, who claims to be a half-sister of decedent by reason of a common father.

The decedent, John P. Fay, died intestate on August 19, 1970, in St. Nazaire, France. At his death, the decedent was a citizen of the United States and a domiciliary of the State and County of New York. His gross estate approximates $6,000,000. Born in Edinburgh, Scotland, on April 20, 1892, the decedent's birth certificate, registered in Edinburgh on August 11, 1892, was signed by one John Fay and Elizabeth Hunter Weatherall. Although the certificate provided for inclusion of the location and date of the marriage of the child's parents, this information was left blank. Moreover, the certificate specifically stated that decedent's birth was illegitimate.

On May 1, 1892, prior to the registration of his birth, decedent was baptized in Edinburgh. Unlike his birth certificate, decedent's baptismal certificate was not signed by his parents. It did include in printed form, however, the word "conjugum", symbolic of the lawful marital status of the child's parents. Beyond decedent's birth and baptismal certificates, there exists no documentary evidence concerning his legitimacy. There exists only the remarkable tale of his early life. There is little doubt that at an early age the decedent and each of his

parents parted ways. From papers found in the decedent's possession, it appears that sometime between 1898 and 1901 the decedent was enrolled in a boarding school in Ireland. For a number of years prior to his enrollment, decedent lived in a foster home with a woman, whom he addressed as "aunt". By the age of 13, however, the decedent, having signed aboard a sailing vessel, was living entirely on his own. He continued to work as a seaman until 1910, when he decided to reside in the United States. It was in 1918 that decedent, while serving in the United States Army, applied for United States citizenship.

As for his parents, at decedent's birth in 1892, his mother, Elizabeth Hunter Weatherall, who had been widowed in 1888, had three sons: Arthur, William and James. The issue of Arthur—Kate Weatherall Spencer and Florence S. Weatherall—and of William—Laurette Caillol—claim to be the sole distributees of the decedent. In 1900, decedent's father, John Fay, married one Hattie Fradley. Appellant Violet Josephine Fay Buck, an issue of this union, claims, as stated before, to be a distributee of the decedent by reason of a common father.

After considering these claims, as well as others not relevant to this appeal, the Surrogate sustained the objections of Kate Weatherall Spencer, Florence S. Weatherall and Laurette Caillol, who claimed through the mother's bloodline, and dismissed the objections of appellant Buck who claimed relationship by reason of a common father upon the ground "that decedent was not legitimate", thereby precluding inheritance through his putative father. The Appellate Division unanimously affirmed for the reasons stated by the Surrogate.

The issue in this case is twofold: whether the decedent was illegitimate; and, if so, whether EPTL 4-1.2, subdivision (b), which precludes inheritance by the paternal kindred of an illegitimate, is violative of equal protection.

There is an established legal presumption that every person is born legitimately. (*Hynes* v. *McDermott*, 91 N.Y. 451, 458; *Matter of Matthews*, 153 N.Y. 443, 447; Fisch, New York Evidence, § 1129 [2d ed.]; Richardson, Evidence, § 59 [10th ed.].) Although this presumption operates most commonly in cases in which the issue involved is not the validity of the parents' marriage, but, rather, the paternity of the child, it does come into play in any case in which legitimacy is in issue. (*Matter of Matthews*, 153 N.Y., at p. 447, *supra*.) It has often been described as "one of the strongest and most persuasive [presumptions] known to the law." (*Matter of Findlay*, 253 N.Y. 1, 7.) However, the presumption of legitimacy is not conclusive: it may be rebutted where to do otherwise would outrage common sense and reason. (*Id.* at p. 8; *Anonymous* v. *Anonymous*, 1 A.D.2d 312.)

The basic problem then is one of proof and it depends upon whether or not there is sufficient evidence in the record to sustain the Surrogate's finding "that upon both the oral and documentary evidence presented it must conclude that decedent was illegitimate." In reaching this conclusion, the Surrogate placed greater weight upon the decedent's birth certificate than upon his baptismal certificate. As he noted, no evidence existed to establish that the decedent's parents were present at the baptismal. This fact stands in marked contrast to the registration of the decedent's birth—the certificate of which was signed by both parents and indicated that the child was

illegitimate. As a result, the Surrogate determined that upon the evidence presented at trial, the presumption of legitimacy was overcome and therefore concluded "that decedent was not a legitimate child." This question of fact having been determined adversely to the appellant and affirmed by the Appellate Division, it presents no question of law which can be reviewed by our court. (See *Howard* v. *Murray*, 38 N.Y.2d 695, 699.)

With respect to the second issue on this appeal—whether EPTL 4-1.2, subdivision (b), which precludes inheritance by the paternal kindred of an illegitimate, is violative of equal protection—appellant argues that this statute discriminates unconstitutionally against decedent's paternal kindred.

EPTL 4-1.2 deals with inheritance by or from illegitimate persons. It provides in pertinent part:

"(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

* * * * *

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)."

In *Matter of Lalli* (43 N.Y.2d 65, app. docketed, No. 77-1115, 46 U.S.L.W. 3498), we recently upheld the constitutionality of subdivision (a)(2) of EPTL 4-1.2, which requires, before an illegitimate child may inherit from his father, a filiation order made within the lifetime of the father in a proceeding commenced during the pregnancy of the child's mother or within two years of the child's birth. In *Lalli*, we considered the constitutionality of our statute in light of the Supreme Court's decision in *Trimble* v. *Gordon* (430 U.S. 762), wherein the Court struck down an Illinois statute which permitted an illegitimate to inherit from his father only upon proof that his parents had subsequently intermarried. (Ill. Rev. Stat., ch. 3, § 12 [1961].)

In distinguishing our statute, we noted that the standard of review to be applied "while 'less than strict scrutiny' is nonetheless 'not a toothless one'." (*Matter of Lalli*, 43 N.Y.2d at p. 67, *supra*, quoting *Trimble* v. *Gordon*, 430 U.S., at p. 767, *supra*.) Although we acknowledged that a remote rational relationship between our statute and a legitimate State purpose would be insufficient to sustain its constitutionality, we also observed that the Supreme Court recognized that "[t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and,

even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance." (*Matter of Lalli*, 43 N.Y.2d, at pp. 68-69, *supra*, quoting *Trimble* v. *Gordon*, 430 U.S., at p. 771, *supra*.)

With this standard of review in mind, we sustained the limitation upon an illegitimate's right to inherit from his father contained in EPTL 4-1.2, subdivision (a)(2). Appellant's claim of unconstitutionality presents no greater challenge. An order of filiation declaring decedent's father to be John Fay, also the father of the appellant by Hattie Fradley, was never made. Certainly, if in the absence of an order of filiation an illegitimate child may constitutionally be precluded from inheriting from his father, it is beyond reproach to preclude, in the absence of a fiiliation order, inheritance by the paternal kindred of the illegitimate. We are not concerned with a natural child claiming to be a distributee from his father, nor a situation where a putative father makes a claim as against his illegitimate child, but rather a situation where another individual who claims to be a half-sister of a decedent through a common father seeks a share in the illegitimate's estate.

Appellant challenges, however, the facial constitutionality of the preclusion of inheritance by paternal kindred of an illegitimate, other than the father, irrespective of the existence of an order of filiation. Applying a less than strict scrutiny, but yet not a "toothless" standard of review, we hold that the preclusion of inheritance by the paternal kindred of an illegitimate, at least where there has been no order of filiation, is not violative of equal protection.

EPTL 4-1.2 was enacted by the Legislature on the basis of the study and recommendations of the Bennett

Commission on Estates (Fourth Report, Temporary State Comm. on the Modernization, Revision and Simplification of Laws of Estates, N. Y. Legis. Doc. 1965, No. 19, pp. 233-271.) It was the Commission's belief that the maternal kindred of an illegitimate child would often have knowledge of the child's birth whether or not an order of fiiliation was ever made. In contrast, the Commission believed that frequently the paternal kindred of an illegitimate may not have knowledge of the child's birth, notwithstanding the existence of an order of filiation. By excluding paternal kindred, other than the father, from the class of an illegitimate's distributees, the Commission sought to avoid creation "by law [of] a family group that did not exist in reality." (*Id.*, at p. 266.)

It should not be overlooked that this exclusion is not directed at the illegitimate. It is not a punishment for the conduct of his or her parents. Nor are individuals related to the illegitimate decedent denied inheritance on the basis of their sex. It is merely a legislative judgment designed to ensure that only the true members of an illegitimate's family are permitted to share in his or her estate. In addition, it serves a legitimate purpose in providing for the orderly settlement of estates and the dependability of title to property passing under our laws of intestate distribution. We thus find no constitutional infirmity in precluding inheritance by the paternal kindred of an illegitimate.

The order of the Appellate Division should be affirmed, with costs, payable out of the estate, to all parties separately appearing and filing separate briefs.

* * * * *

Order affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the estate.
Opinion by Jasen, J. All concur.
Decided March 29, 1978

APPENDIX B

Final Judgment of the Court of Appeals, State of New York, dated March 29, 1978, Case No. 103 (formal parts omitted)

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

The appellant in the above entitled appeal appeared by James G. McGoldrick; the respondent(s) appeared by White & Case; and Louis J. Lefkowitz, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the estate. Opinion by Jasen, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Surrogate's Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA,
Clerk of the Court.

Court of Appeals, Clerk's Office, Albany, March 29, 1978.

APPENDIX C

Notice of Appeal to United States Supreme Court

SURROGATE'S COURT
COUNTY OF NEW YORK
File No. 5035—1970

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of JOHN PATRICK FAY, also known as JOHN P. FAY,

Deceased.

NOTICE is hereby given that Appellant VIOLET JOSEPHINE FAY BUCK (the daughter of John Fay, putative father of decedent) hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals, State of New York, entered on March 29, 1978, affirming the decree of Surrogate's Court, New York County, dismissing her objections to said intermediate account and her claim as a distributee herein, and adjudging that Estates Powers and Trusts Law § 4-1.2 is constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).
Dated: April 25, 1978.

JAMES G. MCGOLDRICK
Attorney for Appellant
20 Broad Street
New York, New York 10005
(212) 422-6767

To: WHITE & CASE, ESQS.
Attorneys for Spencer, et al., Appellees
14 Wall Street
New York, New York 10005

HON LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
(Irwin M. Strum, Esq.)
Two World Trade Center
New York, New York 10047

APPENDIX D

Decedent's Baptismal Certificate (Latin)

EXTRACTUM EX LIBRO BAPTIZATORUM,

Ecclesiæ SS. Cordis Jesu, ——— *apud* Lauriston, Edinburgin *Diœcesi* S. Andreæ et Edinburgen

No. III, pag. 506

A581

Anno 1892 die 20° mensis Aprilis natus anno 1892 die 10° mensis Maii baptizatus est Joannes Herbertus Fay ——— filius Joannis et Elisabethæ ——— et ——— (olim Hunter ——— ———) conjugum: a me Thoma Greenan S.J. ———

~~Patrinus fuit~~ ——— Matrina fuit Violetta Mc Intosh ———

Ego cancell. eccles. Eccles. SS. Cordis Jesu, Edinb. in Diœcesi S. Andreæ et Edinburgensis testor prædictum extractum in omnibus esse conforme cum Registro. In cujus fidem hunc testimonio mea manu subscripsi Thoma Greenan S.J. die 1°. Novembris ——— Anno Domini MCMXXIII.

Decedent's Personal Papers
Tb-Decedent's: Baptism Cert.
(Latin side)

APPENDIX E

Decedent's Baptismal Certificate (English)

Obj. Buck's Collective Ex. 1
Decedent's Personal Papers
Ib-Deced't's. Baptism Cert.
(English side)

CERTIFICATE OF BAPTISM.

According to the Register of Baptisms kept at the Church of the Sacred Heart, Lauriston, Edinburgh

John Herbert Hay Son of John Hay and Eliza Hay

formerly Wearter lawfully Married, Born 20th April 1892

was Baptised at the said Church, by Father Thomas Freeman SJ on the 1st day of

May 1892, Violet McIntosh and being God-Parents.

I, the undersigned, hereby certify that the above is a true and correct extract from the Register of Baptisms kept at the above Church. As witness my hand, this 1st day of November 1923

Thomas Higgins

A580

Rosehill Brothers Ltd., Castle Street, Liverpool.

F-1

APPENDIX F

Decedent's Birth Certificate

2d Edinburgh Ent 2 in evr.
6-5-73
AD.

No.	(1.) Name and Surname	(2.) When and Where Born.	(3.) Sex.	(4.) Name, Surname, & Rank or Profession of Father. Name, and Maiden Surname of Mother. Date and Place of Marriage.	(5.) Signature and Qualification of Informant, and Residence, if out of the House in which the Birth occurred.	(6.) When and Where Registered, and Signature of Registrar.
1294	John Hendrie Fay.	1892. May Twentieth. 11h 5m P.M. No 13 Caledonian Road. Edinburgh.	M.	John Fay. Coal Merchant. Eliza Hunter Hendrie Formerly Bothwell Widow of James Harper Tea-tax Bank Clerk who died in Holywood Ireland 15th of April 1858.	Eliza Hunter Hendrie Fay Mother. Eliz Fay Edinburgh	189... August 11th At Edinburgh. John Alexander Registrar.

Obj. Buck's Exhibit 29
Decedent's Birth Record

RESP.
Buck

SURROGATE'S COURT
NEW YORK COUNTY
EXHIBIT NO.
MAR 20 1974
MARCUS
COURT

A656

APPENDIX G

Excerpts from Recommendations of the Bennett Commission on Estates (April 3, 1964), pages 240-241, 265-268

pp. 240-241:

Recommendations in Brief

1. It is recommended that for the purpose of inheritance to and through an illegitimate child, such child be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants and collaterals in all degrees, whether or not the mother has legitimate children.

2. It is recommended that the Decedent Estate Law be amended to grant the illegitimate the right to inherit from his father the share of a legitimate child of such father, but only when a court of competent jurisdiction has, during the lifetime of the father, made an order declaring the illegitimate to be a child of such father and entitled to inherit from him. Such an order may be based on a voluntary acknowledgment made before the court in form sufficient for recordation. No agreement or compromise, of itself, shall establish a right to inherit by the illegitimate in the absence of such court order. The fact that the party alleged to be the father has furnished support for the child, has recorded his name on the child's birth certificate, or has acknowledged the child in any other manner, shall not be evidence sufficient to establish a right of inheritance, by the illegitimate in the absence of the court order mentioned above.

3. It is recommended that no proceeding to establish the paternity of the child shall be brought after the lapse of more than two years from the birth of the child.

4. It is recommended that the court which rendered the order described in recommendation 2, *supra*, may re-

lieve the party alleged to be the father from it, pursuant to Rule 5015 CPLR, but only where:

(a) the motion to be relieved from the effect of such order is made by the party declared to be the father; and

(b) the motion is made not more than one year after the entry of such order.

5. It is recommended that the present law be continued in that all those from whom the illegitimate and his issue may inherit may inheritfrom him and his issue in the order and amount prescribed by the statutes of descent and distribution governing inheritance from a legitimate and his issue.

6. It is recommended that formal acknowledgments made in foreign jurisdictions that meet the requirements set forth in this report for a valid acknowledgment in New York be recognized as valid in this State.

pp. 265-268:

Recommendations in Detail

The recommendations of this report are intended to grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children while protecting innocent adults and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs. This end is achieved by equating legitimates and illegitimates for the purpose of inheritance from the mother and maternal kindred, and granting the illegitimate a limited right of inheritance from his father subject to statutory safeguards. The adoption of the recommendations proposed in this report will safeguard the interests of the

illegitimate in the proceeds of a successful action for wrongful death, and estates passing by will or devise, as well as in estates descending and being distributed by operation of the law of intestate succession.

The wording of the provision governing inheritance by the illegitimate from his mother and his mother's kn is taken from the Texas statute. It is intended to apply whether or not the illegitimate has been acknowledged by his father, and whether or not the mother has legitimate children. The recommendation would grant the illegitimate the right to inherit from his mother, and all her kindred including her other illegitimate children. As may be seen in Appendix A to this report 20 states of varying wealth and population have already granted the illegitimate such a right, while only Louisiana has a policy more stringent than New York's in this area.

The acknowledged illegitimate may inherit only from his father and not from the father's kindred because it is assumed that members of the mother's family will often have knowledge of the fact that she has given birth to an illegitimate child and make testamentary provision to exclude such child from sharing in their estate if they wish, while the relatives of the father, in most instances, will have no such knowledge or opportunity. In addition, it is intended that recognized illegitimates be barred from inheriting from recognized illegitimates or legitmate children of the same father by a dfferent mother. To allow such suits would impede unnecessarily the administration of estates, invite blackmailing litigation, and create by law a family group that did not exist in reality.

The illegitimate issue of a male illegitimate will inherit from their father only if he has recognized them, and will not inherit from their grandfather whether he has recognized their father or not. The illegitimate issue of

a female illegitimate are similarly barred from inheriting from their mother's father, whether he has recognized the mother or not.

Inheritance from the unrecognized illegitimate is to be governed by an extension of the present rule. The property of the illegitimate will descend to his spouse and issue, if there are any, and if there are none, to the mother and her kindred. Descent and distribution of the estate of a recognized illegitimate whose father and mother are alive at his decease shall be according to the ordinary descent and distribution statute. However, no kindred of the father may represent him to take from the estate of the recognized illegitimate.

The utmost caution should be exercised to protect innocent men from unjust accusations in paternity claims. To avoid this hazard, no informal method of acknowledgment has been provided for in the recommendations. While a formal acknowledgment alone would be a considerable advance over the statutes of most states allowing inheritance from an acknowldging father, it is felt that the recommendation here made gives even more protection against such hazard. The procedure in other states provides merely that any informal witnessed writing establishing the relationship of father and child between the deceased and the claimant is sufficient to establish paternity, allows paternity to be established after the death of the father, thus affording considerable opportunity for falsification of evidence and inviting harassing litigation. These problems are eliminated by requiring a court order establishing paternity during the lifetime of the father.

At present, the Family Court has "exclusive original jurisdiction to establish paternity" under section 511 of the Family Court Act. It is felt that because the action to establish paternity for the purposes of heirship must

be brought in the Family Court, confusion might arise as to whether the order of the court established in the illegitimate a right to support or a right to inherit from the father. This is an important distinction because under secton 516 of the Family Court Act, the court may approve a support agreement made by the parties themselves without finding of paternity. For this reason it has been recommended that in order for the child to inherit the order of the Family Court must declare the illegitimate to be the child of the putative father and entitled to inherit from him rather than merely stating that the child is entitled to support. In addition, proof that the putative father has furnished support for the child, which section 517 of the Family Court Act intimates is a sufficient acknowledgment of paternity, has been specifically excluded as a basis upon which paternity for the purposes of heirship may be established without the order of the court. Thus, where several men have had intercourse with the mother, the Family Court in its discretion may provide that only a right to support has been established, and the putative father will have the opptrounity to make a settlement that provides for support and grants no right of inheritance to the illegitimate. It may be argued that the institution of paternity proceedings under present law is often motivated by blackmail, harassment or fraud, but the recommendation in no way enlarge the risk of injustice in that area.

A further safeguard is to be found in the statute of limitations recommended which bars a suit to establish heirship not brought within two years after the birth of the child. The two-year period is currently prescribed by section 517 of the Family Court Act in paternity proceedings. The statute of limitations will not apply to voluntary acknowledgments.

Excerpts from Recommendations of the Bennett Commission on Estates (April 3, 1964), pages 240-241, 265-268

The statute of limitations on a motion to obtain relief from the order of the Family Court is adopted from Rule 5015 of the C.P.L.R. The grounds for relief there stated are excusable default, newly discovered evidence, fraud, misrepresentation or other misconduct, lack of jurisdiction, or reversal, modification or vacatur. Rule 5015 imposes no statute of limitations on a motion for relief except one year in the case of excusable default. The commentary to the section states that a "reasonable time" is implied. This would provide insufficient protection for the illegitimate and render uncertain the identity of probable heirs and distributees of the estate. In addition, a "reasonable time" might alow the motion to be made by the heirs after the death of the father. For these reasons the recommendations provide that the motion must be made "by the party declared to be the father . . . not more than one year after the entry" of the order establishing a right of inheritance in the illegitimate.

The final recommendation is intended to protect those illegitimates entitled to inherit in the jurisdiction where they were acknowledged. It is also intended that no acknowledgment resulting from a judicial proceeding commenced after the death of the father in another jurisdiction shall establish any right to inherit in New York, nor shall an informal acknowledgment in another jurisdiction affect the devolution of property in New York.

6. CONCLUSION

The present policy of New York State which severely limits the rights of illegitimates should be altered to grant them the inheritance rights recommended in this report.

Dated: April 3, 1964.